

21610.7

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)	
HWH CONSTRUCTION COMPANY, INC.,)	
)	
Appellant,)	PCEB No. 77-119
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF WASHINGTON,)	AND ORDER
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

This matter, the appeal of respondent Department of Ecology's Order Docket No. 77-366, came before the Pollution Control Hearings Board, W. A. Gissberg, Chairman (presiding), Dave J. Mooney, and Chris Smith on November 3, 1977 at an informal hearing in Lacey.

Appellant was represented by Harold Hill, its president; respondent was represented by Robert V. Jensen, Assistant Attorney General.

Having heard the testimony, having examined the exhibits,

1 and having considered the contentions of the parties, the
2 Pollution Control Hearings Board makes these

3 FINDINGS OF FACT

4 I

5 Appellant is engaged in the construction business and is
6 headquartered on Mercer Island, Washington. It has built or
7 caused to be constructed all of the works or structures concerned
8 herein, which include certain bank modifications and piling
9 bulkhead upon the banks of the Green River in Tukwila, Washington.
10 Its president, Harold Hill, personally owns the land with
11 improvements which includes the Grantree Furniture Store building.

12 II

13 In October 1972, appellant was issued a permit by respondent
14 to "construct and maintain" a building and piling bulkhead upon
15 the above-described site on property owned by it subject to certain
16 special conditions. Pursuant to the permit, appellant completed
17 construction in accordance with its approved plans.

18 TII

19 In December 1975, the Green River reached flood stage for
20 some duration before the banks eroded upstream from appellant's
21 property line at a point on land owned by Seattle City Light. The
22 eroded bank allowed the moving floodwaters to saturate and/or erode
23 the soil anchoring the downstream bulkhead supports resulting in the
24 destruction of two portions of appellant's bulkhead. Appellant,
25 faced with the immediate endangerment to Mr. Hill's building from
26 the flood, commenced emergency measures to protect the property by pla 3

27 FINAL FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

1 "rubble" in the breached portions of the bulkhead and upon the banks
2 of the river upstream of its property line where erosion had
3 initially commenced. The "rubble" deposited on the banks during the
4 flood consisted primarily of metals, concrete chunks, asphalt and
5 brick. "Pit run" material excavated nearby was added to fill
6 voids in the rubble. These emergency measures took two days to
7 complete. The department considers the rubble unsatisfactory for
8 the intended purpose of bank stabilization.

9 IV

10 After the flood, respondent requested certain information
11 from appellant so that a permit, or permit amendment, could be issued
12 to replace the rubble with more permanent works. Although two
13 portions of the bulkhead, approximately 200 feet on the southwest
14 end and 100 feet located about 300 feet east of the western side
15 were destroyed, appellant intends only to repair the latter breach
16 and leave the rubble as is in the former breach. Appellant claims
17 to have spent \$75,000 in emergency work and repairs thus far at
18 the site. Respondent, convinced that the remaining rubble has
19 encroached into the river and has changed the regimen of the stream
20 such that properties upstream, downstream and across the river
21 would be adversely affected, issued a regulatory order requiring that
22 appellant remove the 'construction rubble specified in correspondence
23 . . . and placement of minimal rock riprap" As the basis of
24 the order, respondent asserts that appellant violated special conditions
25 2 and 4 of its 1972 permit which provide that:

26
27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

2. The bulkhead line shown on cross section 2 of cross section plan shall be shifted landward to elevation 5 feet MSL to prevent encroachment into channel. The piling bulkhead alignment shall be along the 5 feet contour elevation (Mean Sea Level Datum).

4. The river bank at the toe of the proposed bulkhead and any other river bank area disturbed by the proposed construction shall be stabilized with rock riprap to the satisfaction of the King County Department of Public Works, Hydraulics Division. (Emphasis supplied)

• • • •

V

The rubble deposited by appellant affects the cross-sectional area of the Green River only in an insignificant manner and would not adversely influence the regimen of the stream nor adversely affect the security of life, health and property against damage by flood water. Although respondent considers such rubble unsatisfactory for bank stabilization, appellant's successful protection of its works and structure with the rubble during the 1975 flood bespeaks its effectiveness in a future flood. Moreover, removal of the rubble upstream from appellant, and upon property not owned by it, would place in jeopardy appellant's works and structures because a known eroding area would again be exposed to the river thereby threatening damage to property and, perhaps, life.

VI

Any Conclusion of Law which shall be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the persons and over the
4 subject matter of this proceeding.

5 II

6 Respondent contends that appellant violated special conditions
7 2 and 4 of the 1972 permit.

8 Condition 2 required that the original bulkhead be constructed
9 at a designated place and alignment. We have found (See Finding of
10 Fact II) that appellant did construct in accordance with the permit.

11 Condition 4 required that if the river bank was disturbed by the
12 originally proposed construction, the bank was to be stabilized
13 with rock riprap. Once again, appellant's original construction was
14 in accordance with the permit. Condition 4 applies only to the
15 original construction of the bulkhead. It does not apply to
16 construction thereafter performed pursuant to an emergency.

17 III

18 Respondent contends that RCW 86.16.020 authorizes the issuance
19 of the instant regulatory order. While that statute authorizes
20 regulatory abatement orders, orders issued pursuant thereto must
21 relate to:

22 . . . works, structures and improvements,
23 . . . which might, if improperly planned,
24 constructed, operated and maintained,
25 adversely influence the regimen of a
stream . . . or might adversely affect
the security of life, health and
property against damage by flood water.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

1 Since we have found (Finding of Fact V) that the emergency construction
2 would not adversely influence the regimen of the stream nor adversely
3 affect life, health and property, the instant regulatory order cannot
4 be upheld by applying the above statute.

5 IV

6 Respondent, in effect, contends that since the original permit
7 requires appellant to "construct and maintain a piling bulkhead
8 and building", there is placed upon appellant an affirmative duty to
9 "maintain" such construction forever. We do not so construe the
10 permit nor the statute (RCW 86.16.080) requiring permits and exempting
11 emergency construction from permit requirements.

12 It is clear, from a careful reading of RCW 86.16.080, that
13 no permit is required either to repair, reconstruct, or restore,
14 property damaged by flood waters when, in an emergency, it is
15 necessary to repair, reconstruct or restore property damaged by
16 flood waters. Such is the case here. If no permit is required
17 for such work where none has ever been issued, it would be anomalous
18 to construe the statutory emergency provision as having no effect
19 where a permit had been previously issued.

20 Furthermore we construe the provisions of the instant permit
21 as authorizing, but not requiring, appellant to "construct and
22 maintain piling bulkhead and building."

23 V

24 There was no legal duty which required appellant to place the
25 rubble on the Seattle City Light upstream property. Rather, appellant
26 acted in an emergency when flood waters were not only damaging the

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 City Light land, but threatening the building and land of appellant
2 as well. To now require that appellant remove the material it used
3 to protect against the flood at the City Light site would result in the
4 river bank to again become unprotected and recreate a situation
5 where a future flood would endanger lives or damage property.
6 Appellant, having had no legal duty to protect the City Light
7 property in the first instance, has none now and cannot be
8 required to improve upon the rubble placed in an emergency situation.

9 VI

10 The Department of Ecology order should be vacated because:
11 (1) it is not factually authorized by RCW 86.16.020; (2) it is not
12 supported by any requirement of the permit; (3) the emergency work
13 is of the type authorized to be done without a permit by RCW 86.16.080.

14 If, however, in a proper case, this Board concluded that work
15 done under emergency flooding conditions was of such a nature so as to
16 cause an after-flood stream condition which adversely influenced
17 the regimen of a stream, we would not hesitate in affirming a
18 Department of Ecology abatement order. Suffice it to say that such
19 are not the facts of the case now before us.

20 VII

21 Any Finding of Fact which should be deemed a Conclusion of Law
22 is hereby adopted as such.

23 From these Conclusions the Pollution Control Hearings Board
24 enters this
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

ORDER

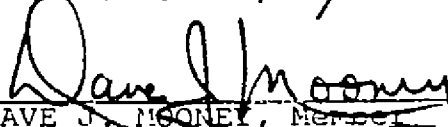
The Department of Ecology Order Docket No. 77-366 is
vacated.

DATED this 19th day of December, 1977.

POLLUTION CONTROL HEARINGS BOARD



W. A. GISSBERG, Chairman



DAVE J. MOONEY, Member

(SEE DISSENT)

CHRIS SMITH, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

1 SMITH, CHRIS (dissenting)--I dissent from the decision and would
2 substitute the following findings, conclusions, and order in place of
3 those of the majority.

4 FINDINGS OF FACT

5 V

6 The rubble deposited by appellant can cause water backup, erosion,
7 and harmful deposition of eroded materials in the river bed, and change
8 in velocities of water, present a hazard to others during a flood;
9 interfere with navigation. The dumped rubble is not a stable material
10 which, by past experience, could resist dislocation or damage from
11 another flood, and is thereby unsatisfactory under material and design
12 considerations. Such rubble adversely affects the regimen of the Green
3 River.

14 CONCLUSIONS OF LAW

15 II-IV

16 We note, and respondent admits, that RCW 86.16.080 provides
17 that permits are not required in cases of emergency:

18 [W]henever, in cases of emergency, flood
19 waters shall threaten to or shall endanger
20 lives or damage property, or it shall be
21 necessary to repair, reconstruct, or restore
22 property damaged by such flood waters, in
order that such property may be used
immediately for the purpose or purposes
theretofore used, no permit shall be
required.

23 Thus, appellant's works completed during the flood did not require
24 a permit. But having completed such emergency work, what obligation,
25 if any, is placed upon appellant for the restoration of the original
6 improvements after the emergency is over? Appellant's original
27 permit is to "construct and maintain" a piling bulkhead and building.

1 The word "maintain" is variously defined as "acts of repairs . . . hold
2 or keep in an existing state or conditions . . . keep from falling,
3 declining, or ceasing . . . keep in proper condition . . . rebuild
4" Black's Law Dictionary, (4th ed. 1968) p. 1105. Thus,
5 notwithstanding the emergency, it is appellant's obligation under the
6 terms of the permit to keep that which it has created in conformance
7 with the permit. Because the present bulkhead, with portions of
8 "rubble," is not that which is permitted, appellant must either
9 conform to its permit or seek a permit amendment. Since it has
10 not been granted an amendment to its permit, respondent's regulatory
11 order to remove unsatisfactory matter, i.e., the rubble, was
12 proper and should be affirmed with respect to conditions 2 and 4 on
13 appellant's property.

14 As we have found in Finding V, the rubble dumped by appellant
15 is not a stable material which would "allow for the orderly flow and
16 removal of all floodwaters" as required by WAC 508-60-070.

17 Independent of the permit requirements, respondent, under its
18 regulatory authority, may issue an order to require the "maintenance"
19 of any works, structures and improvements, which if improperly maintained,
20 would adversely affect the regimen of a stream. RCW 86.16.020. The
21 respondent's order could also be affirmed on this alternative ground.

22
23
24 
25 CHRIS SMITH, Member

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER